No. 10877

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RINGLING BROS., BARNUM & BAILEY COMBINED SHOWS, INC., a corporation, and AL G. BARNES AMUSEMENT COMPANY, a corporation,

Appellants,

vs.

AMERICA OLVERA, also known as America Olvera Pollinger,

Appellee.

SUPPLEMENTAL

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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INDEX TO SUPPLEMENTAL TRANSCRIPT.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

In the District Court of the United States for the Southern District of California
Central Division

No. 8367-B—Civil

AMERICA OLVERA, also known as America Olvera Pollinger,

Plaintiff,

vs.

AL G. BARNES AMUSEMENT COMPANY, a corporation, RINGLING BROS., BARNUM AND BAILEY COMBINED SHOWS, INC., et al.,

Defendants.

MOTION

To the Defendants (Appellants) Above Named and to Their Attorneys, O'Garrett, Combs & Murphine, George P. Kinkle, John S. Hunt & Lee Combs.

You and Each of You, will please take notice that the plaintiff (Appellee) America Olvera Pollinger, will on the 15th day of January, 1945, at the hour of 10:00 A. M. before the Honorable Campbell E. Beaumont, Judge Presiding and as soon thereafter as counsel can be heard move said Court for its order correcting the misstatements and to include in said record on appeal the omissions as more particularly set forth in the suggestion of the plaintiff herein, all as provided by Rule 75-H of the Rules of Federal Procedure.

Dated: This 5th day of January, 1945.

DAVID C. MARCUS
Attorney for Plaintiff

Points and Authorities

75-H Rules of Federal Procedure
Miller vs. Miller, 114 Fed. 2nd. 596
Clawans vs. White, 112 Fed. 2nd. 189
United States vs. Broderbeck, 139 Fed. 2nd. 916

[Endorsed]: Filed Jan. 5, 1945.

[Title of District Court and Cause.]

SUGGESTIONS FOR DESIGNATION OF PORTIONS OF RECORD AND PROCEEDINGS FOR CORRECTION OF MISSTATEMENT TO BE CONTAINED AND CORRECTED IN THE RECORD ON APPEAL PURSUANT TO RULE 75-H OF RULES OF FEDERAL PROCEDURE.

Now comes the plaintiff (Appellee) in the above entitled cause and suggests to this Honorable Court that in the above entitled cause now pending on appeal before the United States Circuit Court of Appeals for the Ninth Circuit, that the transcript of record is incomplete and that the evidence in the particular as hereinafter designated has by error or accident been misstated which are a part of the record in said cause and are important and material for a proper understanding of the question raised on appeal and are not included in and made a part of said transcript of record.

The following portion of the record has been misstated: page 146 of the Reporter's Transcript, testimony and proceedings at the trial on direct examination by David C. Marcus, attorney for plaintiff of America Ol-

vera Pollinger, taken on January 4th, 1944; the Reporters' Transcript contains the following erroneous question:

"Q. Are you a naturalized American Citizen?"

That the correct question was:

"Q. Are you a Mexican National Citizen?"

On page 160 of the same record and witness the following answer was given:

"Q. By Mr. Marcus: Tell us how.

A. When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing any more, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter."

The record should have contained the following omission:

(Witness directing and indicating to Karl Pollinger to assisst in demonstrating operation of trapeze.)

The follwoing have been omitted entirely from the record on appeal which are material and important to a proper understanding of the questions raised. On January 18, 1944, defendants (Appellants) filed their (1) motion to set asi*cd* verdict and judgment non obstante veredicto and on January 25, 1944 filed their (2) motion for a new trial, supported by the affidavit of Lee Combs, attorney for Defendants (Appellants). That in said affidavit and

motions the said defendants and said Lee Combs, charged the Court with prejudicial misconduct with having

> "Consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said grounds alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for the defendants called in at said time consultations at which instructions were discussed."

That said attorney further charged this Court with the following:

> "That the Court in holding private conferences concerning instructions with opposing counsel, left counsel for defendants uninformed of his intention regarding instructions, both as to the submission of plaintiff's Instructions 14-a and in relation to the correction and alteration and change of defendants' instruction.
>
> That the change in these instructions and the rejection of certain instructions submitted on behalf of the defendants, which rejection counsel for defendants were first informed of upon the reading of the instructions to the jury, prohibited defendants' counsel from re-submitting instructions to the jury on the master and servant doctrine; that affiant is informed and believes that the jury found against the defendants on the theory that the contract had been abrogated and waived by virtue of defendants supplying plaintiff with the net and operating same themselves and decided the case on ordinary negligence and against defendants on that question; that the course and conduct of the Court as indicated was one of

bias and prejudice and said course, consistently carried out, developed and created in the mind of the jury a prejudice against defendants with the result that the verdict rendered in the above entitled matter was the result of passion, prejudice and influence."

That said motions were argued by respective counsel before said Court on the 7th day of March, 1944, at which time the said Court rendered its oral opinion answering the said charges of said defendants of prejudicial misconduct and stating his grounds and basis for his ruling and thereupon denied said motion to set aside the verdict, etc., and continued under submission the motion for new trial.

That thereafter and on the 30th day of June, 1944, the said Court did deny defendants' motion for new trial. That at said time and place the said Court did render its further oral opinion answering the defendants' charges of bias and prejudice and stating his grounds and basis for its ruling as aforesaid.

That no part or portion of said oral opinion of said Court nor any part or portion of said grounds, basis and answer of said Court given and rendered in and made part of said record on the ruling of said motions were or are included in and made a part of said transcript of record on appeal. That each, every and all the foregoing omissions are material and important for the following reasons:

That said Court did answer said charges of prejudicial misconduct, bias and prejudice p*icu*larly within his own knowledge and that said charges were without b*ais*, grounds and foundation. That plaintiff (Appellee) attaches herewith a transcribed copy of said oral opinion of said Court.

Wherefore plaintiff prays that this Court order and direct the correction of the testimony as herein above related and the inclusion in said record of the omissions all as before related and that a supplemental record thereof be ordered, prepared and transmitted by the Clerk of said Court to be included in the said record on appeal and thereupon to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of said record on appeal.

DAVID C. MARCUS
Attorney for Plaintiff

[Verified.]

[Endorsed]: Filed Jan. 5, 1945.

[Minutes: Monday, January 15, 1945]

Present: The Honorable Campbell E. Beaumont, District Judge.

This cause coming on for hearing motion of plaintiff for order correcting record on appeal, pursuant to motion and notice filed January 5, 1945; David C. Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs, Esq., appearing as counsel for the defendants; H. A. Dewing, Court Reporter, being present:

Counsel argue. The Court denies motion as to suggestion commencing on page 2, line 5; grants suggestion commencing on page 2, line 20; and grants suggestion commencing on page 1, line 29, of document entitled "Suggestions for Designation of Portions of Record," etc., filed January 5, 1945.

And it is ordered that transcript of this hearing be included in record on appeal.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing seven pages contain full, true and correct copies of Motion; Suggestions for Designation of Portions of Record and Proceedings for Correction of Misstatement to be Contained and Corrected in the Record on Appeal Pursuant to Rule 75-H of Rules of Federal Procedure; and Minute Order Entered January 15, 1945 which, together with copy of Reporter's Transcript of Proceedings on January 15, 1945 and copy of Reporter's Transcript of Proceedings on Hearing of Motion of Defendants Filed January 16, 1944, to Set Aside Verdict and Judgment Entered in Favor of Defendants in Accordance with Motion for a Directed Verdict by Defendants Heretofore Made, and for Judgment Non Obstante Veredicto, transmitted herewith, constitute a supplement to the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing supplemental transcript amount to $3.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 7 day of July, 1945.

[Seal] EDMUND L. SMITH, Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

Hon. Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING OF MOTION OF DEFENDANTS FILED JANUARY 16, 1944, TO SET ASIDE VERDICT AND JUDGMENT ENTERED IN FAVOR OF DEFENDANTS IN ACCORDANCE WITH MOTION FOR A DIRECTED VERDICT BY DEFENDANTS HERETOFORE MADE, AND FOR JUDGMENT NON OBSTANTE VEREDICTO

Appearances:

David C. Marcus, Esq.,
for the plaintiff.

Lee Combs, Esq.,
for the defendants.

Los Angeles, California, Monday, March 6, 1944,
2:00 P. M.

* * * * * * * * *

The Court: When the question came up with regard to the instructions on master and servant, my recollection is that it came up the first time when the three counsel were present,—two for the defendants and one for the plaintiff, and that the observation was made that since the ruling in the case that went to the Appellate Court, the instructions regarding master and servant were not applicable, and I think then I said, "Is is your desire, Mr. Combs, to withdraw them?" And you replied it was; but the court made no request that you do so. In twenty-three years on the bench, speaking of myself as a judge,

I have never requested the withdrawal of an instruction in my court.

Mr. Combs: That is substantially what the affidavit says, in any event.

The Court: I don't think it is, substantially. That is my recollection.

Mr. Combs: I don't like to disagree with your Honor. My impression is a little bit different.

The Court: That is my recollection.

Mr. Combs: I know we had a discussion on the 5th, in court. I put that date down. I know we also had one on the 8th.

The Court: I couldn't say about the dates. [2*]

Mr. Combs: Anyway, reasonably sound minds can be mistaken on those things.

The Court: That is true. Another thing that happened later on, when you said that you would withdraw them, you did not withdraw all of them. I looked through, and saw at least one—there may have been two—and I said, "Mr. Combs, you didn't withdraw all of your instructions," and you said, "No, I notice that I did not, but I think I will leave them in there. My theory is that the master and servant rule does not apply, but I have other counsel, and I think I should let them stay in." I said, "Very well, let them stay in." I refused to give them.

* * * * * * * * *

The Court: We can all be wrong in our recollection. When we were going over the instructions Mr. Marcus did not appear on time. We talked for some time; you and Mr. Corkery and I talked rather informally on some

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*Page number appearing at top of Reporter's Transcript.

other matters for some time. Finally I said, "It isn't fair for one person to hold everybody up. While I have to be here all the time, you gentlemen don't have to be. It is Saturday morning," I said, "and I don't think we should wait for Mr. Marcus any longer." We began, and just as we began—we had not much more than started,—Mr. Marcus came in. I told Mr. Marcus we had started to discuss the instructions, and what had been said, I believe, about the [3] first instruction offered by him.

During the course of the discussion upon the instructions, which lasted from the time Mr. Marcus came in, which I would say was around twenty minutes after ten, or so, until, I think it was twenty minutes or a quarter to one, I suggested we go out and get some lunch. You said, "I will have to call up my family, because they are expecting me home." Mr. Marcus said he had illness in his family. I said, "Very well. We have gone over these instructions. After all, they are the court's instructions. I will go over them, and see what should be done."

During the time from, say about twenty minutes after ten, or so, until the time I mentioned when you left, we (Combs, Corkery and Marcus being present) spent all of that time discussing instructions. One of those in-instructions was 14. There were two or three others. You said, "Well, your Honor, this instruction is entirely wrong. It doesn't take into consideration the question of contributory negligence." I said, "When I was at my home last night I looked over the instructions, and I wrote out an instruction which I think covers that," and I read the instruction, which I had just written out in pencil. You said, "I don't think it covers everything. It doesn't cover their contributory negligence." I said,

"As I have framed it, on the question of proximate cause, I believe that is sufficient to cover it." [4]

Mr. Combs: I recall that discussion.

The Court: I said, "I think there are some decisions which would support that." Mr. Marcus then said, "If the court will reframe that instruction I will ask him to give it. I will withdraw this other instruction." Then I marked on there "May be withdrawn," thinking Mr. Marcus would come in, and maybe he would withdraw it, and that the court would reframe the instruction, which the court did. He told me later his wife had been very ill; his secretary was sick; and he had a great many things to do at home, so he did not come in to withdraw it. Mr. Marcus left it there. I had marked it "May be withdrawn." I think the marks are still on there; and I marked it "Refused." That is my recollection, Mr. Combs, of what happened.

Mr. Combs: There will be other things. For example, your Honor attempted to draw a formula instruction. We approached the bench.

The Court: That was not a formula instruction.

Mr. Combs: Mr. Marcus objected because of the repetition of the words "You shall find for the defendants."

The Court: That was not a formula instruction. What I was trying to do, and I so stated, was to set the issues out clearly, and there were two or three bases on which, if they determined the evidence in that respect, they could not find for the plaintiff. So I set these up; I think about [5] three of them, and then at the last I made some other statement; I said, "All of these terms will be defined." I showed it to you. I think the three of you were standing here, right in front of the bench. I said, "I want to put this up clearly to the jury, and I wrote

this out. Is there anyone who has any objection to this?" You looked at it and said, "No, I think that's all right." You turned to Mr. Corkery, and Mr. Corkery said, "No, I don't think that covers one element." Then Mr. Marcus said, "Your Honor, I want to call this to your attention, that these are like some of the railroad instructions that the attorneys for the railroad get out. They will say, 'If so-and-so, you must find for the defendant.' When the court gives all these instructions that places that before the jury." I said, "I realize that. I tried to avoid that. The court has tried to avoid it in preparing instructions all through these years; has tried to give the proper ones, because there are certain things on which the jury cannot find for the plaintiff." I said to Mr. Marcus, "So far as these things are concerned, if it is an unavoidable accident, or if it was an assumed risk that was incident to the nature of the business, and she had an accident, she could not recover, and there is no reason why it shouldn't be placed there. Mr. Marcus did not say anything. However, I did not give it. That was one I prepared entirely. It was not one that was attempted to be [6] a modification of the one presented by Mr. Marcus. It was only for the purpose of putting the issues clearly before the jury.

Mr. Combs: I think your Honor on the whole has very well recited the circumstances. I think I have a little different interpretation as to some of them, but in substance it is not a great deal different. I will drop the subject.

* * * * * * * * * [7]

Los Angeles, California, Tuesday, March 7, 1944; 10:00 A. M.

The Court: The court intended to rule on all of these matters now, but will rule only upon the motion for judgment non obstante veredicto. I think that that motion should be denied, and it is. But as to the motion for a new trial, I am going to give further consideration to the instructions.

I endeavored to give the instructions which I thought covered the issues, but no matter how careful either counsel or the court may be in preparing instructions, we never know how proper they are until they are viewed in a more detached way, which comes when a motion for a new trial is made, or upon appeal.

But of one thing I am very, very sure, and that is there was no bias on my part, no prejudice whatsoever. I certainly never have sat in a case in which I have been prejudiced at all. There have been cases in which I have had some particular feeling, either that I was in favor of or adverse to a party, and I have disqualified myself. There have been other cases in which there has been some appearance, perhaps, for some party for whom I had been attorney maybe years before I had gone on the bench, or where, perhaps, some person during the time I was in the State court, and had to run for office, had been very active either for or against me in my election, or some other instance, where the possibility of a business affair which would not disqualify [8] me, but which, if unexplained, might indicate that there was some connection between the party and the court, and I have been so careful about those things that I have leaned backward. In fact I have been criticized at times for doing so, and for doing so under such circumstances.

sometimes, where it was said by those who did not like me that I was trying to escape a difficult situation by having some other judge try a case. Those are things which each judge has to determine for himself, and that I have done; but, certainly, I have never sat in any case in which I have been biased, or in which I have had any feeling of prejudice whatsoever, and I think, looking at it as I do, I would be the first one to know that.

However, I was impressed with what Mr. Combs had said, even if he did not question the sincerity of the court, that the court might, without its own knowledge, have done things which would indicate a leaning toward the plaintiff, and I tried to review some of those things. I can't think of any.

Certainly, during the course of the trial the judge has to rule, and at times to give an explanation for his rulings. The judges of the court are no more perfect than counsel are. They may say things which at the time appear to be entirely proper, which, when viewed later might carry with them some implications that were not intended; but in a protracted lawsuit that is likely to happen. There would never be a judgment that would be sustained if every [9] little word which came up, or every word which the court used, would be scrutinized in the strongest light. The purpose of courts is to do substantial justice. We can all make mistakes. We are all human, and as long as we are, we are going to make mistakes.

One of these things I recall, and I am sure all of you gentlemen will recall, is that in the discussions as to certain instructions—I think they were the instructions upon damages—there was an objection which was in writ-

ing, and which were filed. The court asked that they be filed, and they were filed. At that time they were not filed, and we were discussing them Saturday morning in my chambers, and I said I did not believe that the defendants' objection was sufficient; that it would not come within the provisions of the rule. Mr. Corkery asked if I had in mind that it wouldn't be specific enough. I said, "Yes, Mr. Corkery"—no doubt, you will recall I have done that throughout the trial—"I don't care anything about one party or another. It is all in the day's work for me, but I do want to see proper instructions. And I also like to see that the parties keep their record. If they want to make a record of the rulings of the court that, of course, they have a right to do."

The day before the trial of this case—I think it was on Monday—Mr. Marcus, before the beginning of the law and motion calendar, approached the lectern, and Mr. Combs [10] was there. He said Miss Olvera wanted to amend her complaint to ask for a greater amount of damages, and without waiting for Mr. Combs to object I said immediately "I think the court knows enough about this situation to deny that motion." I thought that the motion had not properly been presented, and that no affidavit had been made to show that there was any change, so that was my immediate reaction. I think throughout this trial both parties will find places throughout the record where I made suggestions to counsel, and statements that the court made regarding what its rulings were. In considering the motion for a new trial, of course the court will consider the evidence as presented in this case, not only on the question of damages, but upon all other questions.

As I say, it really was quite a surprise to find that I had been charged with bias and prejudice in this case, when I knew that I had none. I try to be fair to everyone, no matter who he is, and I considered the fact that Mr. Combs had said that without the court's knowing it even, prejudice might have been reflected. I knew I did not have any prejudice, but at the same time I had that argument in mind, so I read over parts of the transcript—not all of it: I did not read Mr. Pollinger's testimony, but I read Miss Olvera's.

Here is a time (referring to transcript of Miss Olvera's testimony at the trial), when I thought Mr. Marcus was taking up too much time with the examination of Miss Olvera on direct examination. I don't like to interfere. [11] I don't like to interrupt. I figure that the attorney knows more about this case than I do, but, of course, the court had this before it: The case had been tried once before, and I felt that the appellate court had crystallized the issues quite well, and that it had fixed the law of the case upon certain of the issues. So, after a long answer, beginning on page 5, line 7, and continuing over to page 6, line 2, I interrupted Mr. Marcus, as follows:

"The Court: Mr. Marcus, do you think it is important to go through these details, until she did attain the position of a recognized trapeze artist?

"Mr. Marcus: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

"The Court: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don't think it is important."

That was for the purpose of saving time. It is the duty of the court to direct the progress of the trial. Page 8 the court again interrupted. A question had been asked by Mr. Marcus, and Mr. Combs said:

"We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. Circus.

"The Court: Isn't that sufficient? [12]

"Mr. Marcus: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

"Mr. Combs: I don't know that. If you will ask her.

"The Court: Let me ask you: In view of the appellate court's decision in this matter is that important?

"Mr. Marcus: I don't think so.

"Mr. Combs: No."

There we were all in agreement, but the question was asked by the court for the purpose of saving time, a proper direction, as the court believed, of the course of the trial, and without any thought as to whom it should benefit at all. That did not have any part in the court's mind. On page 9 a question was asked by Mr. Marcus:

"Q—Relate the conversation to the jury, at the time the contract was executed.

"The Court: What is the importance of it when you have the contract received in evidence?"

It might have been Mr. Marcus had something very important in mind, but I did not consider it was, and that is the reason I asked him the question, and, as

shown by statements of counsel as follows, they agreed with the court:

"Mr. Combs: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes Show: that she was received there, and employed by that show under the terms of that contract." [13]

On page 10 the court said:

"Might it not be agreed that she was an independent contractor?

"Mr. Combs: Yes.

"Mr. Marcus: So stipulated, your Honor."

On page 28, Mr. Combs stated:

"I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated without having to make it each time, after each question.

"The Court: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

"Mr. Marcus: Yes."

I think that is another indication of the readiness of the court to agree to anything that would preserve the record, in this instance in favor of the defendants. On page 36, line 24:

"Mr. Combs: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct.

"The Court: The court will admonish counsel to avoid leading questions."

Which I think I did from time to time throughout the trial. Mr. Marcus did ask a number of leading ques-

tions, as lots of counsel do. Ordinarily they are not objected to unless they get right down to a very important matter or very important issue, and Mr. Combs took that position, [14] a time or two, that while the questions were leading, they happened to be more preliminary than otherwise, and did not get right down to the important parts. In fact, right on the same page, line 19, is the following:

"The Court: Mr. Marcus, I wish you would bear in mind the court's admonition. However, this seems to be preliminary.

"Mr. Combs: I don't care about it unless it gets up to the point where it is critical."

Then I added:

"A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them."

I had in mind, of course, objections made where they were leading, and that it was the duty of the court to sustain them. On page 40, line 22, an answer was made by Miss Olvera, and Mr. Combs stated:

"If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel's questions are leading and suggestive.

"The Court: You may make your motion to strike out, if you think you would like to have the court consider it.

"Mr. Combs: I don't want to hamper the speed, of course, [15] of this trial, but I have to combat with this

persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can't anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

"The Court: Would you read Mr. Combs' statement?

"(Statement read by the reporter.)

"The Court: Proceed."

The court still thought he should proceed, as he had given Mr. Combs an opportunity there to make his motion if he desired, as I would any counsel in any case. I think you will recall, during the course of the trial, a matter which occurred out of the presence of the jury, when the court itself had excused the jury, there was some statement about the ruling of the court, and that the court's mind was already made up. I explained to Mr. Combs that the court's mind was not made up; that the court did not foreclose its mind until the matter had been entirely submitted; and he had a right to argue the matter at any time. I don't recall about that, but I think I ruled in favor of Mr. Combs. But, in any event, before the jury returned, I think I called attention to the fact that Mr. Combs had made this statement, and he very properly stated that during the course of the trial, in the heat of it, statements are made which are not given full consideration, and asked to apologize, and did apologize to the court. I said the [16] apology was accepted, as the court understood these things; and the court does understand them, and is always inclined to be very lenient with the statements that are made under such circumstances. But I think considered statements that are made otherwise should be given their full credit, always taking, of course, into consideration the fact that any of us may be mistaken as to matters of

memory. Page 68, line 22, a question was being asked by Mr. Combs of the witness Olvera:

"You don't mean to give the jury the impression—"

Then I interrupted Mr. Combs, stating:

"I think you are asking about what the custom was when she was performing her act. She was referring to the very last act.

"Mr. Combs: What I am trying to bring out is the fact that they remained there stationary right in the center under the trapeze during the entire period of time.

"The Court: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

"Mr. Combs: Let me see if I can clear that up."

There the court was endeavoring to clear up a point, where I believed Mr. Combs was asking questions about one thing and the witness was answering about another. There is another question on the same page, line 8, where Mr. [17] Marcus interposed this objection:

"Mr. Marcus: I object to that as calling for the conclusion of the witness.

"The Court: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled."

On page 74, line 16, Miss Olvera answered:

"Yes, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men."

She at that time pointed to one of her shoulders. I said:

"You are referring to your right shoulder?

"A—Yes, right here; not on the shoulder. I struck in here.

"The Court: You changed around to your left shoulder.

"Q—By Mr. Combs: Was it his right shoulder?

"A—I try to show you. I don't remember.

"Q—By the Court: You don't know whether it was the right shoulder?

"A—No, I don't."

There I noticed that she had changed from one shoulder to the other, and pointed to it, and I thought it was proper to call that to the attention of the attorneys, and I wasn't interested in whose favor it was. I just thought that was an inconsistency or discrepancy that attention should be called to. [18]

Page 86, line 19, the following appears:

"The Court: In any event it calls for the conclusion of the witness. Mr. Combs, you don't mind the court suggesting something?

"Mr. Combs: Not a bit.

"The Court: In your questions you have used the phrase a number of times 'I take it' such and such. Just ask the question directly, and I think it will be more definite.

"Mr. Combs: I will withdraw it and reframe it."

I think afterwards Mr. Combs did change that. A time or two he used the same expression, but he changed it, as I stated I believed it would be better to ask the question directly. I have never hesitated to make suggestions to counsel during the course of the trial, because I only had in mind one thing, and that was to see that all the parties got a fair trial. I may say that

judges vary in their actions in the trial of a case. Some judges take a very large part in the trial of a case, and some hardly say anything, but judges are different, just as lawyers are, and they have to do these things according to their own views and their own temperaments. On page 87 Mr. Combs had asked a question, to which there was an objection, and Mr. Combs said:

"Mr. Combs: Just answer the question; if she saw anybody do anything.

"Mr. Marcus: Ask her that question.

"Mr. Combs: Did you?" [19]

Then the court asked to have the question read.

"The Court: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained."

On page 88 there is another example. The court noticed a mistake in the use of a word, and thought it should be called to the attention of the attorneys. It was on cross examination. On line 8, Mr. Combs said:

"Q—Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn't it?

"A—What?

"The Court: Read the question, Mr. Dewing.

"(Question read by the reporter.)

"The Court: Do you mean act or action?

"Mr. Combs: I mean act.

"The Court: Reframe your question."

Mr. Combs then reframed the question, and used the word "act." I though he meant "act," but that he had inadvertently used the wrong word. That happens to all of us. I think there is no one who does not use the wrong word at times. For example, I read an instruction, in which I used a word I did not intend. It was called to my attention. I had no [20] knowledge of it. But that frequently happens; not only happens in the course of ordinary conversation, but in court. I have had attorneys refer to plaintiff when they meant defendant, and vice versa; things just exactly the opposite. On page 90 there was a discussion between Mr. Marcus and Mr. Combs. I thought the matter was clear. Line 16:

"The Court: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn't it, Mr. Combs?

"Mr. Combs: Certainly, your Honor.

"Mr. Marcus: If he did, your Honor, I don't believe the question includes that statement.

"Mr. Combs: We will just amend it to include it then.

"Mr. Marcus: Thank you."

There was a place where the court desired to make the point entirely clear. So, in reading over this, I can't see that there is any reflection of an indication of bias. I know there was none. Nobody would know that better than myself; and I know there was none. Even considering the points which were brought out by Mr. Combs, considering all of those things, I can say I don't think there was any indication of bias, and I don't see how there could have been bias, because none existed.

I did not refer to all of the matters that I saw in the testimony of Miss Olvera which I thought might

have some bearing on that point, but I don't think the court will [21] make any further statement in regard to the matter now, except that I am going to give very serious consideration to whether or not the instructions were justified by the law and the evidence, and when the court has done so it will make its ruling.

Mr. Combs: Would you like to keep that copy of the transcript for a while?

The Court: No, I don't believe it will serve any purpose. If I need it, Mr. Combs, I shall ask Mr. Dewing if he will read over certain parts of the testimony, or I may have it written up for me. I may say that I did have Mr. Dewing read for me that part which had to do with the interruption of counsel for the defendant, and certainly there was nothing in there that, in the court's opinion, would justify the conclusion that Mr. Combs has reached.

There occurs to me another thing which I would like to mention, and that is the reading of defendants' instruction No. 4, and then advising the jury to disregard it, and reading it again as the court corrected it. Immediately thereafter the court read a part of instruction 5, which was given by the court. The court was of the opinion that it was unnecessary to add that part, which was marked out. The court failed to give that part of the instruction, and it was so indicated, that it was given as modified, and gave instruction 4 as modified.

Now, as to stopping for five minutes or so, again I [22] dwell upon the imperfection of judges, the same as the lawyers. When I went over the instructions I decided to give instruction 4 as it was offered. Then,

in reading it, it had a different sound, had a different effect, and I felt that it was improper to give it as it had been presented, and I considered the propriety of changing it, and finally I did make the changes which appear upon the face of the instruction. It took some little time for the court to determine that, and also to make the changes, but that is not unusual in cases. It isn't the ordinary thing, it is true, because ordinarily among judges—and that applies to myself—generally judges who prepare the instructions give them just as they are prepared. And in a case it sometimes happens a judge may decide to change the instruction, even after he has given it; and that's what happened in this case, and I think it was not prejudicial, and there certainly was no intent on the part of the court except to make the instruction conform to what the court believed the law is.

I think the court has covered most of these matters. When this affidavit was filed by Mr. Combs I thought I might have some other judge sit upon this motion, but I came to the conclusion, and this after consulting a judge of our court, who has had long experience here, that when it came to the matter of a motion for a new trial that I was really the only judge who could and should act upon the motion. It [23] would be different upon the trial of a case in which a judge is charged with being prejudiced, at the beginning of the case. Then it would be entirely proper, and it is the law, if there is an affidavit of prejudice filed, that some other judge should sit upon it.

Also, when I viewed Mr. Combs' affidavit very carefully, I came to the conclusion that he was not making a direct and general statement of bias and prejudice on the part of the judge of the court, but that such bias and prejudice had resulted from certain facts which he had set out in the affidavit.

Notwithstanding all of these matters, I still desire to give further time and consideration to the question of the instructions.

So far as the evidence is concerned, I am convinced that it was a case which should have been submitted to the jury. I think that the motions for a non-suit and an instructed verdict were properly denied, and that the same rule of law applies to the judgment non obstante veredicto, as it does to the motions for a directed verdict. The court must consider them in the same light. I believe, although I have not looked at it for some time, that there is a case in 210 Cal., Union Bank and Trust Company v. Hunt, which is a very clear exposition of the proper consideration of motions such as are before the court today.

Referring to the Appellate Court decision upon the [24] question of the evidence presented in the other case, Mr. Marcus read all of the part which the court now expects to read. Reading from the decision (119 Fed. (2d) 584):

"Appellants admit that the stock control of both circuses was in a common trust, though each has an in-

dependent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes' circus was of 'its,' Ringling's, circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances; that they were caused by either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling management."

As I view that, that is a direct statement regarding the question of gross negligence, as well as ordinary negligence; but it says that the jury properly could infer that the injuries were caused by either gross negligence or ordinary negligence.

The part read by Mr. Combs was the further statement that "There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing" materials, and so forth. So while we have the direct statement here of Judge Mathews that in his opinion there was no evidence either of gross or ordinary negligence in the case, on the other hand we have [25] the opinion of the majority members of the court that there was evidence from which the jury properly could infer that the injuries were caused either by gross negligence or ordinary negligence.

The matter may now stand submitted.

[Endorsed]: Filed Jun. 7, 1945. [26]

[Title of District Court and Cause.]

Hon. Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

David C. Marcus, Esq.,
for plaintiff.
Lee Combs, Esq.,
for defendants.

Los Angeles, California, Monday, January 15, 1945,
10 A. M.

Mr. Marcus: Your Honor, this is a motion pursuant to Rule 75-H of the Rules of Federal Procedure, for the purpose of correcting certain errors in the record, and for the purpose of designating further portions of the record to be incorporated in the printed record on appeal.

The first mistake in the transcript is as follows: On page 146 of the printed record on appeal the question was asked by counsel for the plaintiff:

"Q—Are you a naturalized American citizen?"

The correct question was:

"Q—Are you a Mexican National citizen?"

I don't think there is any dispute about the fact, and apparently there must have been some error in the transcription of it. The next correction is on page 160 of the record. The witness was asked:

"Q—By Mr. Marcus: Tell us how."

In reference to the operation of the trapeze. At that time the trapeze was in court, and was in the position of being demonstrated. She replied:

"A—When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing out of the lines, it lengthened itself, and the trapeze never gave a swing anymore, like this. I wish I never fell [2] down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter."

At the end of that answer the record should have indicated that the witness was directing her husband, Karl Pollinger, to assist in demonstrating the operation of the trapeze. A reading of the record preceding that question and answer will readily disclose that was the situation. The trapeze was being demonstrated by the witness and her counsel. The next portion which I consider of particular importance in the record is the failure to include the court's observations, and its reasons for the denial of the motion to set aside the verdict and judgment non obstante veredicto. The grounds of the motion, as shown by the affidavit, and the portions that are important in this motion, in this affidavit recite certain charges of bias and prejudice, and those are directed at the trial court. They are rather serious in nature. I presume the court has them in mind, and I shall not repeat them.

In denying the motion for judgment non obstante veredicto the court took some considerable time, effort and pains in pointing out in the record itself wherein the court felt, and in its own mind believed that there was

no bias or prejudice in the court's mind at any time during the course of the trial. [3]

The Court: I think you are mistaken as to one point. The court knew in its own mind that there was no bias or prejudice, and pointed out in the record what it believed to be the portions of the record which showed why any person, in the court's opinion, would think there was no bias or prejudice. Your statement was not exactly correct.

Mr. Marcus: In designating the portions of the transcript on appeal, I believe, from the notice given to the clerk and reporter for the preparation of the record, that that should have been included, because the request for the transcript was broad enough so that it would have included the court's observations made at that time. Those were not included in the transcript on appeal. Furthermore, at the time of the court's denial of the motion for a new trial the court made further observations in the matter, and in counsel's opinion answered the charges contained in the affidavit. I might state, parenthetically, your Honor, that the defendants have made much of that charge on their appeal. We have received their opening brief. In fairness to the court and to counsel and to the parties litigant I feel that it is important, and of the utmost importance, to include that portion of the record in the transcript. [4]

The Court: Let me see if I have this correctly in mind, Mr. Marcus. There are two parts of the record which you believe should be changed, and that there should be included the statements of the court at the time of the denial of the motion for judgment non obstante veredicto, and the statements of the court at the time of the denial of the motion for a new trial?

Mr. Marcus: That is correct.

The Court: Is there any objection?

Mr. Combs: Yes, there are objections, your Honor. The first point is the point that counsel desires to change the transcript as it now stands on the subject of citizenship. As a matter of fact, the real fact of the matter, and which we are willing to stipulate, is that America Olvera is a Mexican citizen, who married a German citizen. What the legal effect of that is I have not ascertained; whether she is a German citizen by reason of that marriage, or a Mexican citizen, I don't know. Suffice it to say, there is a diversity of citizenship in this case, and there would still be a diversity of citizenship, if she were an American citizen. If the record is changed, it should be changed to show she is a Mexican citizen married to a German citizen. What legal consequences follow from that I don't know.

The Court: Upon that point, I think the court should decide the question as to the first motion, which is [5] to correct it to show: Are you a Mexican National citizen? What have you to say about that, Mr. Marcus?

Mr. Marcus: Your Honor, that was the question I asked: Are you a Mexican National citizen?

The Court: What do you recall about the form of the question, Mr. Combs?

Mr. Combs: I don't know. My impression is that the question was: Are you a naturalized American citizen? I don't care what the form of the question was. We will stipulate she is a Mexican citizen married to a German citizen, and let the cards fall where they may. We have made no point of it.

Mr. Marcus: That isn't the point, to stipulate to an addition to the record. My concern is to have the question correct.

Mr. Combs: My recollection is that the question is correct. You asked that question and expected a negative answer, and in the stress of the trial you did not get it. If we are going to correct the record to speak the truth it seems we should have the additional factor. Who knows but what I would have asked a little more as to her citizenship on cross examination? I am not infallible. It meant nothing to me at the time of the trial. I knew she could establish her grounds of jurisdiction in the federal court. In fact, in the opening brief I say: America Olvera, an alien. That gives her jurisdiction. That [6] is a jurisdictional statement, and it is enough under the federal rules.

The Court: That, however, might not be sufficient, if the record shows it, because there are cases in which the court, on appeal, found the statement in the record, and has acted upon that. I know of one particular case.

Mr. Marcus: Your Honor, counsel made a motion for a change of venue himself from the state to the federal court, that is, counsel for the defendant, based upon the ground of diversity of citizenship, in that the plaintiff was a Mexican citizen, and the defendants were American residents.

The Court: The question now is whether the record should be changed to change the question. My recollection is certainly not definite in regard to it. I don't recall about it.

Mr. Combs: My recollection is he did ask that question. It is vague; so vague that I do not want to base any statement on it. I think we all thought she answered that question, and it was passed, and none of us thought of it again, but I am not going to stand on a point of that character. I have conceded in my opening brief that she is an alien, and she is. What happened

was, counsel mentioned that she was a single woman, as I recall, when she first filed action. Then she married Pollinger.

Mr. Marcus: Counsel is in error.

Mr. Combs: Maybe I am in error on that.

Mr Marcus: Your [7] Honor, the question is definite and certain in my mind. There are no doubts about it. I asked her: Are you a Mexican National citizen? for the purpose of laying the foundation as to diversity of citizenship. It wasn't encumbent upon the defendants to prove that. It was encumbent upon the plaintiff to prove it and the record will show that at the prior trial that was in the transcript. At the time, I asked identically the same question of the witness: Are you a Mexican National citizen?

The Court: As a matter of interest, do you have with you that transcript on the prior trial?

Mr. Marcus: No, I did not bring it with me, your Honor, but I can get it.

The Court: It is quite possible that the reporter may have misunderstood, because, after all, the vowel sounds of a number of vowels in there are quite alike. The record should speak the truth. The court is very reluctant to change a reporter's transcript. Mr. Dewing is a good reporter, but he is subject to mistakes as well as anybody, and he is very willing to admit it if he does make a mistake. He has looked at his record, and his notes seem to be clear. I think it would help somewhat if you had the record here, and would refer to it. As I recall, you had the record before you of the other trial, and both you and Mr. Combs referred to it in asking certain questions, probably for the sake of conciseness and covering [8] the same ground which you thought proper to be covered.

Mr. Marcus: I did, sir.

The Clerk: I can get the transcript in a few minutes.

Mr. Marcus: The truth is, your Honor, she is a Mexican National citizen.

The Court: Here is the record.

Mr. Combs: I will always regret that I did not examine her more fully on that subject, for whatever benefit it would have been, to display the fact that her husband was a German citizen. There are some cases which prohibit aliens maintaining an action. I doubt if this is such a case. I regret I did not examine into the subject, so as to straighten out the record on that subject.

Mr. Marcus: The first page of the record indicates that the following questions were asked:

"A—I was born June 8, 1906.

"Q—By Mr. Marcus: Where at?

"A—Mazatlan, Sinaloa, Mexico.

"Q—Sinaloa, that is a state?

"A—That is a state."

That is part of it.

The Court: There seems to be considerable in that record. Perhaps you had better pass that point, and take up the other.

Mr. Combs: The next point is pertaining to adding an explanation at the end of certain testimony, to the [9] following effect:

"(Witness directing and indicating to Karl Pollinger to assist in demonstrating operation of trapeze.)"

There wasn't any such actual performance going on at that time, within my recollection. It is true that Pollinger stood here during a substantial part of that evidence, part of the time, and held up the trapeze, but the

record evidences that fact, because I made an objection to it myself, and made a statement to the court. Mr. Pollinger and Mr. Marcus were holding the trapeze up in a manner which I considered was calculated deliberately to induce the jury to believe that the 8-hook could hang up there in the manner claimed by the defendant. I approached the bench and made a statement to the court. That was the only reference, as I recall, of the presence of Mr. Pollinger.

The statements of fact appear in the record. The testimony and circumstances in the trial can only be reflected by the words and language used by the parties involved. To insert explanatory matter in one case would require its insertion in numerous others. Then going one step further, it would require the intonation of the voices. We all know we can say a thing one way, and by intonation make its effect considerably different than what the actual words say. Appellate courts are all cognizant of that fact. That is why certain of the controverted [10] facts ordinarily, unless so impossible as not to be believed, or some other such limitations, are viewed in favor of the appellee.

We think it would be not only an error in this particular instance itself, but a very remarkable thing, indeed, to select one piece of testimony and insert explanatory matter, almost a year after the trial. I imagine it is a year. It was January 15th; exactly a year from the time the verdict came in. So I certainly would strenuously resist any such insertion of explanatory matter. It isn't claimed that any language was left out. The language speaks for itself. Maybe it doesn't mean what I think it means. I might be able to argue that. I don't know.

Mr. Marcus: I want to refer to the record itself immediately prior to the asking of that question. Referring to pages 158, 159 and 160. I will just read a portion of it.

"Q—Is there any way of making the bottom bar level in the event that this 8-hook overlaps, as it does here?

"Mr. Combs: I object to that as calling for the conclusion of the witness.

"Mr. Marcus If she knows.

"The Court She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't [11] mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?

"A—I would like to hear it again."

There was an objection that it was leading and suggestive.

"Q—By Mr. Marcus: Will you tell us how, when the hook is in the position that it is—

"The Court: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

"Mr. Marcus: The 8-hook overlaps the ring on the upper bar.

"The Court: The top part of the 8-hook?

"Mr. Marcus: That is right.

"The Court: Turn it around so the jury may see it. Now proceed with your examination.

"Q—By Mr. Marcus: Tell me how the lower bar can remain level when one of the lines overlaps, the way we have indicated here.

"Mr. Combs: I object to that as calling for the conclusion of the witness.

"The Court: Overruled. You may answer.

"A—I know now how it would be, from experience.

"Q—By Mr. Marcus: Tell us how.

"A—When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other [12] one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing anymore, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter.

"The Court: Do the members of the jury understand the answer?

"A Juror: Is there any method of checking before the performance to see that everything is O. K.?

"The Court: Is there any objection to that question on behalf of either party?

"Mr. Combs: We have no objection to that.

"The Court: Answer the question."

Then on page 162.

"Q—By Mr. Marcus: Is this your apparatus?

"A—Yes." etc.

The record is replete with testimony at that time indicating that the trapeze was being demonstrated and used in the court, and that she at that time requested Mr. Pollinger, who was running back and forth helping me, and holding up the trapeze, or lowering a line, or whatever he did, as the record indicates at that time, and she said, "My husband lower one side to lead up to the other one which was shorter." [13]

The Court: I do not feel inclined to grant that motion. I can't recall it. I know at the time of the examination of Mrs. Pollinger—I don't know how long it continued, but during part of the examination Mr. Pollinger held up the trapeze and the bar above, and it was in that position when the court directed him to turn it so that the jury could see it; but I certainly do not recall that there was any such situation which would warrant the court now in making the statement which is requested. By that I don't mean to say that it did not happen; it is just that my recollection is not sufficient, and it has not been refreshed by anything which would indicate that the motion should be granted. That part of the motion is denied.

Mr. Combs: On the third point I want to take issue with counsel, in a friendly way, and will state that he is slightly mistaken as to the emphasis we place on the point of bias and prejudice in this case. I am not in a position, or at liberty, to disclose exactly what our views are on that at the present time, because we have to present it to the Appellate Court. I will say that an indication on the subject is that that subjects enjoys, on page 83 of an 86-page brief, eleven lines. That is the entire argument on that subject. It is true that in our points on appeal we quote a number of statements by the court which we consider prejudicial, in establishing bias against us; but those are only referred to. So much for that. I am only making [14] that as a statement to give some indication of what the preparers of this brief must have thought of the weight of that point, standing of itself.

It is true I mentioned in the argument on the subject of instruction that subject in relation to our inability to prepare for the instruction, but on that subject I

opened with what I considered a graceful and proper statement on the part of counsel to this effect: We have no quarrel with the trial court instructing the jury in conformity and in accordance with the law. So if the court wanted to give an instruction, he could give any he wanted to; he had the right to do so. Our only objection to that is that we did not have an opportunity to adequately meet the instruction. That is all I want to say on that subject.

As to statements in the opinion, statements by the court, ruling on the motion for a new trial, no duty rests on our shoulders to produce them. We might have been taxed with that portion of the record; we might have been taxed with the costs in connection with the record on that. The proof of the pudding is that the court denied the motion. What the court does in denying the motion is immaterial. The court denied it, and he certainly must not have believed our position, or he would not have denied it. So that matter did not have any proper place in the appeal.

I want to say one thing more about counsel's diligence in this matter. Rule 75 provides the manner in which a [15] transcript is to be corrected and prepared. It states that within ten days after the designation has been served the other party may have an opportunity to serve his designation. We designated the entire record. I enumerated in that designation all the shorthand report of the entire trial, and I think I included some special things we wanted, when we gave notice of our points on appeal; and on the filing of the record we stated that this was all of the record in the case. We understand the law on this to be that counsel must be reasonably diligent. If he does not think it is all of the record

in the case to present his points, he must present his points at this time.

This is a very belated time to make a motion to add matter to the record. The opening brief has been filed. It was filed on the 4th of January, and time is running to file a reply brief. The transcript has been filed for a substantial period of time. We don't believe this is timely made; but the prime point is that the opinion of the court denying a motion for a new trial is immaterial. It isn't even part of the record; it isn't part of the record on appeal. The fact is, we got the order in denying it; and it was denied. That seems to me like the acme of achievement. You can't do better than perfect. It was denied.

The Court: The denial of the motion for a new trial? [16]

Mr. Combs: Yes. He is asking for the opinion.

The Court: I think it is proper that this be concluded. The motion is granted. That applies both to the remarks of the court at the time of the denial of judgment non obstante veredicto, and the remarks of the court at the time of the denial of the motion for a new trial. You included them both in your motion?

Mr. Marcus: I did, your Honor.

The Court: That leaves one other point.

Mr. Marcus: Your Honor, it may have been that I had the complaint in mind at the time, as to the allegation of nationality.

The Court: Look at the complaint and see what that says.

Mr. Combs: If I may address the court?

The Court: Yes.

Mr. Combs: I might state that included in that request we would like also to be the transcript of the hearing—the statements of counsel and court in this proceeding, too, since it is in the nature of a special proceeding, and I think the whole matter should go before the court. We want particularly the objection to the motion, and the application made.

The Court: That is, this present application?

Mr. Combs: Yes, your Honor.

The Court: You are entitled to the benefit of your [17] objection, and that may appear either through the record of the reporter or through the clerk's record. It is entirely satisfactory to the court that the entire transcript of this morning be included. I think that the parties are entitled to their proper motions and to their objections, for whatever benefit it is to them. I have an idea that both parties will be protected by the filing of the motions, and the rulings of the court showing why the motions were granted over an objection where an objection was made; but probably all the parties would desire, or the Circuit Court would desire, to have the record. This court has no desire to deprive either party of an opportunity to present its position. I am not familiar with the procedure on appeals. Those are matters that seldom come before the court. There was an amendment filed to the complaint?

Mr. Marcus: That is right. Will your Honor give me a few minutes' time to look at this record? Your Honor, the only portion of that record I find relative to her citizenship is the fact that she was asked the question in the original transcript:

"Q—Where were you born?

"A—Mazatlan, Sinaloa, Mexico."

I will check the record further; but with reference to the question that was asked at the time, I have a very distinct recollection that she was asked that very question: Are you a Mexican National citizen? Her answer was: Yes. [18] Miss Olvera is in the courtroom, and if your Honor wishes to interrogate her on that she will be happy to take the stand. In fact, she was the one who discovered that error when I handed her the transcript, and she stated she was not asked that.

Mr. Combs: There were many inconsistencies in her testimony. I would dislike the task of enumerating all of them, there are so many.

Mr. Marcus: There is no question as to the fact, your Honor, that she is a Mexican citizen, and was born in Mexico.

Mr. Combs: I am not so sure myself of that.

Mr. Marcus: There is one sure thing; she is not a naturalized American citizen. That is definite and certain.

The Court: Do you have the pre-trial order?

Mr. Marcus: Yes, I have, your Honor.

The Court: Did you look at that?

Mr. Marcus: I did examine that just now.

The Court: Is there any statement in there about citizenship?

Mr. Marcus: The following are the remarks that are in the record, after discussing the pleadings: It was stipulated by plaintiff and defendant that the contract of September 24, 1936, in suit, was entered into by the said parties— [19]

The Court: You don't need to read any of it except about the citizenship, if it is in there, Mr. Marcus.

Mr. Marcus: There is nothing further, your Honor.

The Court: The court will grant that motion. Clearly she is not a naturalized American citizen and that is not disputed. The court has heretofore made some comment upon the similarity in the sound of the words. At times even counsel don't speak distinctly, and it is a mistake that might well be made. In view of the fact that it is contrary to the fact, as admitted by all the parties, and the definite recollection of Mr. Marcus, the court believes the motion should be granted, and it is granted.

Mr. Combs: I take it that the court has still no independent recollection in the matter?

The Court: I have no independent recollection, and I do not purport to base my ruling upon any recollection whatever.

Mr. Combs: I thought that was right.

The Court: I believe that disposes of all the matters.

Mr. Combs: May we have the order include the transcript of this hearing, also? I have stated my objection in the course of the hearing, and it will be difficult to get it in in any other way.

The Court: There is no objection?

Mr. Marcus: I have no objection. Only it comes [20] to the question of paying for it.

Mr. Combs: You pay for your part and we will pay for ours.

The Court: So ordered.

[Endorsed]: Filed Jun. 7, 1945. [21]

[Endorsed]: No. 10877. United States Circuit Court of Appeals for the Ninth Circuit. Ringling Bros., Barnum & Bailey Combined shows, Inc., a corporation, and Al G. Barnes Amusement Company, a corporation, Appellants, vs. America Olvera, also known as America Olvera Pollinger, Appellee. Supplemental Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 9, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.